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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1722

DRIANNE BENNER, JEFFREY GLAZIER, JAMES SCARANTINO, ANNE ZIMINSKY AND CHARLES J. ZITO,

Petitioners,

v.

JOHN W. OSWALD, MILTON H. SHAPP, KENT SHELHAMMER, CARYL KLINE, MAURICE K. GODDARD, HARRY BOYER, HELEN DAVIES, JOSEPH RHODES, JR., ROBERT L. RUTTENBERG, DION C. STEWART, WILLIAM K. ULERICH, H. JESSE ARNELLE, MARIAN U. BARASH, WALTER J. CONTI, BARBARA H. FRANKLIN, RALPH HETZEL, KENNETH L. HOLDERMAN, CHARLES W. SHAEFFER, HELEN WISE, J. LIN HUBER, JOHN M. PHILLIPS, JOHN R. PITZER, JR., LUTHER SNYDER, HARRY R. ULRICH, J. LEWIS WILLIAMS, H. THOMAS HALLOWELL, JR., SAMUEL F. HINKLE, JOHN L. ROMIG, STANLEY G. SCHAFFER, G. ALBERT SHOEMAKER, AND QUENTIN E. WOOD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, John W. Oswald, et al., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit's opinion in this case. That opinion is reported at 592 F.2d 174.

QUESTION PRESENTED

WHETHER STUDENTS ENROLLED AT THE PENNSYLVANIA STATE UNIVERSITY HAVE A RIGHT TO VOTE, GUARANTEED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, FOR THE MEMBERS OF THE BOARD OF TRUSTEES OF THE UNIVERSITY?

A. Statement of Facts.

The Pennsylvania State University (originally the Farmers High School of Pennsylvania) was granted a private nonprofit corporate charter in 1855, by special Act of the legislature. (App. A, p. 4, ¶15).[1] Special Acts of the legislature were the common method of creating corporations at that time. Although the Governor and the Secretary of the Commonwealth were charter members of the board of trustees, the majority of the board consisted of private individuals. The charter provided for the perpetuation of the board by election of private individuals by the private agricultural societies of the counties and of the Pennsylvania State Agricultural Society, a private organization.

There have been numerous amendments to the corporate charter changing the number of trustees and the manner of their selection. These amendments were adopted by the board of trustees and approved by the Court of Common Pleas of Centre County, Pennsylvania, in conformance with the applicable state nonprofit corporate laws applicable to private corporations in effect from time to time. (App. A, p. 5, ¶18.)

[1] References designated by "App.___" are to the Appendices to the petition for writ, said references to ¶ are to the numbered stipulations for the parties which were incorporated in the opinion of the district court.

On March 13, 1867, the board of trustees accepted the benefits of the federal land grant act, Act of 1862, ch. 130, 12 Stat. 503, 7 U.S.C. §§ 301, et seq., after the legislature had designated the University to be the recipient of the benefits of the act. (App. A, p. 4, ¶16.) By reason of this designation, the Commonwealth pledged its support to the University and, over the years, has provided substantial financial support to the University.

Because of this substantial financial support, the board of trustees has amended the corporate charter several times to provide for public representation on the board. However, the public representation has always been in the minority.

The present charter provides that the board shall consist of five ex-officio members (the Governor, Secretary of Education, Secretary of Agriculture, Secretary of Environmental Resources and the President of the University); six members appointed by the Governor; nine members selected by the General Alumni Association; six members selected by delegates representing county agricultural societies in the state; and six members selected by delegates representing county engineering, mining, manufacturing and mechanical societies in the state (hereinafter called "Industrial Societies"). (App. A, p. 5, ¶19.)

The selection process for board membership, mandated by the corporate charter, authorizes members of private organizations, i.e. the agricultural and industrial societies in Pennsylvania, to annually select delegates who in turn annually convene to vote for members of the board. The selection process also authorizes members of the General Alumni Association, a nonprofit corporation, to annually cast mail ballots for members of the board. (App. A., pp. 11-19, ¶¶55-97.)

The corporate charter does not expressly deny to students, or any other class of persons, the right to vote for trustees; rather, it provides for participation in the selection process as described above.

The corporation does not exercise governmental powers. It has no right to acquire property by eminent domain, to levey or collect taxes, to exercise governmental functions in a geographic area or to conduct a public election. The corporate charter states the powers of the corporation as follows:

> " * * * and the said corporation shall, by the same name, have power to sue and be sued, and generally to do and transact all and every business touching or concerning the premises, or which shall be necessarily incidental thereto, and to hold, enjoy, and exercise all such powers, authorities, and jurisdiction as are customary within the colleges within this Commonwealth." (App. A, p. 5, ¶20; Exhibit D1.)

B. Proceedings Below.

Relying on *Sailors v. Board of Education*, 387 U.S. 105 (1967), the District Court concluded that the selection process for membership on the board is not a governmental election within the meaning of *Kramer v. Union Free School District*, 395 U.S. 621 (1969), and its progeny.

The Third Circuit agreed on this issue, and, in addition, concluded:

> "But we refuse to accept the formulation of the student appellants that the right to vote for a university trustee is equivalent to a right to vote in a participatory democracy. We will not conclude that the University trustee selection process is a general public election, or that the trustees perform general governmental functions. The University's board of trustees controls no viable political sub-division and has less power than a local school district. It cannot acquire property by condemnation, levy or collect taxes, or pass on petitions to annex school districts. It simply does not possess the minimum governmental powers associated with municipal, school district, county, state, or federal offices." 592 F.2d at 183.
>
> * * *
>
> "We therefore conclude that the duties of the trustees are not commensurate with the duties of elected public officials; that these duties do not involve the responsibilities going to 'the essence of a democratic society,' and do not implicate decisions that are 'preservative of all rights.' Because the trustees' duties do not approach the quantum of responsibilities of officials selected in a political democracy, we conclude that any individual interests affected by the selection process classifications are not fundamental rights so as to require recourse to the strict judicial scrutiny standard." 592 F.2d 183. (App. B, p. 16-17.)

The Third Circuit then applied the "rational basis test" to the selection process, stating:

> "Our remaining task is to decide whether any rational basis exists to support the distinction which limits participation in the trustee selection process to members of local agricultural and industrial societies and alumni.

"The University originated as the Farmer's High School of Pennsylvania and under the federal statute providing the donation of public lands, it became a land grant college committed to the teaching of agriculture and the mechanic arts. We agree with Judge Muir's determination:

> 'Penn State argues that because of its historic commitment to both agriculture and industrial goals, it is entitled to give members of agricultural and industrial societies a voice in the operation of the university to the exclusion of other interested groups. The Court cannot say as a matter of law that the distinction made between agricultural and industrial societies and other interested groups, including under-graduate students, is wholly unrelated to the achievement of Penn State's underlying objective which is the governance of the affairs of the University. Therefore the charter provisions which give local agricultural and industrial societies a voice in selecting members of Penn State's board of trustees but which deny it to undergraduate students do not violate the equal protection clause.

"414 F. Supp. at 561-62.

"Allowing alumni to participate in the selection process is justified by the premises that those alumni who cast ballots are graduates of the University who have a continuing interest in its affairs. Alumni support of their *alma mater* is a universal phenomenon in the United States and alumni provide an important source of political, social, and financial sustenance. The record here

> reveals that for the period 1953 through 1977 alumni have contributed the sum of $11,247,076 through lifetime gifts or testamentary bequests. An alumni association has been active at Penn State for over 100 years, and the record demonstrates significant participation in University activities.
>
> "Applying the rational basis test, we cannot conclude that the trustee selection process which limits participation to alumni and agricultural and industrial groups is irrational. 'A statutory discrimination will not be set aside if any state of facts reasonbly may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426 (1962)." 592 F.2d 183-184. (App. B, p. 18-19.)

The Third Circuit affirmed the judgment of the District Court in favor of the respondents.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE THIRD CIRCUIT IS NOT INCONSISTENT WITH DECISIONS OF THIS COURT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

1. Petitioners assert that the Third Circuit "broke new ground by applying the rational basis test to classifications established not by democratically elected state legislatures, but by the very body whose legitimacy was being challenged." Petitioners describe the selection process of the corporate charter as "a privately created classification" and argue that, consequently, the strict scrutiny test must be applied because the classification was not created by the democratic electoral process.

This argument, raised for the first time in this case, is novel, but logically flawed. No decision of this Court holds that the determination of the applicable equal protection test (rational basis or strict scrutiny) rests upon whether the classification was privately created or created by the democratic electoral process. Indeed, the application of either test is necessarily predicated upon the existence of state action. *Civil Rights Cases*, 109 U.S. 3 (1883). The existence of state action in this case, if it is present at all, necessarily rests upon a symbiotic relationship between a private nonprofit corporation and the state. *Burton v. Wilmington Parking Authority*, 365, U.S. 715 (1961). The existence of the symbiotic relationship may impose equal protection requirements upon the private nonprofit corporation,[2] but no decision of this Court remotely suggests that private corporations, as opposed to public bodies, are *a fortiori* subject to the strict scrutiny test.

In any event, the classification in question can be "rectified by the democratic process" since the state is free to impose whatever conditions it wishes upon its grant of financial aid, including conditions relating to the composition of the body which shall be the recipient of its bounty.

The decision of the Third Circuit is entirely consistent with the decisions of this Court and the other circuits. It determined that the strict scrutiny test was not applicable because the classification was not "suspect" and because no "fundamental right" to vote was present. *American Party*

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[2] In the Third Circuit, respondents contended that the internal corporate matter of the selection of private members of the board did not involve "state action," although they conceded the existence of state action in all the business activities of Penn State. Respondents still maintain this position, but do not believe that this Court need consider this issue in determining whether to grant certiorari.

of Texas v. White, 415 U.S. 767 (1974). It then applied the rational basis test, as required by the decisions of this Court, [See *Holt Civil Club v. City of Tuscaloosa*, ___ U.S. ___ 99 S. Ct. 383 (1978)] and determined that the classification passed constitutional muster.

2. Petitioners contend that the decision of the Third Circuit conflicts with *Baker v. Regional High School District No. 5*, 520 F.2d 799, 801-802 (2d Cir. 1975), *cert. denied sub nom., Nonnewaug Regional School District v. Scott*, 424 U.S. 965 (1976) and with *Dundee v. Orleans Board of Parish Supervisors*, 434 F.2d 135, 139 (5th Cir. 1970). The conflict allegedly arises from the Third Circuit finding that respondents do not exercise governmental powers within the meaning of *Kramer* and its progeny.

Initially, it must be understood that respondents exercise no governmental powers in that they have no legal authority to perform legislative, administrative or judicial functions for the citizens of the Commonwealth or any political subdivision thereof. The impact of its activities are directly upon students, who may be non-residents of Pennsylvania, and who choose to purchase educational services. The amount of the educational subsidy provided by the Commonwealth of Pennsylvania is decided upon by the General Assembly, in its sole discretion, and not by the respondents. The petitioners do not seek the right to vote as citizens in a general election, but rather because they are students.

Thus, the decisions cited by petitioner are totally inapposite. In *Baker*, supra, the plaintiffs were residents, taxpayers and electors of municipalities in Connecticut who were seeking application of the one person – one vote principle to the election of school board members in regional school districts. The board of the regional school district

exercised considerable governmental powers in the region, although lacking the power to tax or issue bonds. These powers were: (1) all the powers and duties conferred upon boards of education; (2) the power to assume the capital indebtedness issued by towns; (3) to receive property from towns; (4) to build, add to or equip schools for the benefit of towns; (5) to issue bond anticipation notes and to treat the proceeds thereof as other school districts or municipalities; and (6) to propose to the general electorate for ratification the issuance of governmental obligations. The respondents simply do not possess any of these powers.

In *Dundee, supra,* the plaintiff was a citizen, taxpayer and resident of the City of New Orleans who sought application of one person - one vote principle in the election of the board of tax assessors for the city. This board fixed the tax assessment of all taxable property within the Parish of Orleans and the amount of ad valorem taxes for the City of New Orleans and the Orleans Parish School Board and other governmental agencies. The Fifth Circuit held that since the state had determined that these officials be elected by the general electorate, and because of the impact of their actions upon all the citizens of the political subdivision, the principle of one person - one vote had to apply.

Thus, there are three crucial distinctions between the court of appeal's decision in this case and *Baker, supra* and *Dundee, supra.* First, respondents do not exercise any of the governmental powers specified in these decisions. Second, in this case there is no election authorized by the state for the general electorate in a political subdivision. Third, plaintiffs do not seek the right to vote as members of the general electorate, but rather because of their status as students. In light of these distinctions, there is no conflict between the holdings in *Baker* and *Dundee* and the conclusions of the court of appeals in this case that the right to vote was not at issue.

3. Petitioners assert that even under the rational basis test, the selection process for trustees violates equal protection because the reasons for inclusion of agricultural and industrial trustees are based solely upon history. First, of course, the justification for permitting alumni and members of agricultural and industrial societies to participate in the selection process is not "historical accident." Although the rationale may be founded in the historical antecedents of the University, it is as cogent today as it was in 1867 when the University first accepted its continuing obligation to be an institution committed to teaching the agricultural and mechanic arts.

Moreover, petitioners seem to be making the argument that the corporate charter provisions which permit agricultural and industrial societies to select trustees are rational if students are also permitted to select trustees, but are irrational if students are not permitted to participate in the selection. Thus at page 14 of the petition they state:

> "While those reasons may sufficie to permit those with the franchise to continue to vote, they do not provide any rationale for denying students a comparable right."

This argument is necessarily predicated upon the assumption that the corporate charter of Penn State "grants the franchise" to the designated groups on the basis of the same rationale the petitioners advance in support of their "right to vote" for trustees; that is, the effect of the University's activities upon the particular class. Since students are more affected by its activities than are the members of the alumni, and the agricultural societies and industrial societies, presumably it is irrational to exclude the former while including the latter.

Of course, the corporate charter does not "grant the franchise" in any sense of that phrase. Nor does it authorize

persons to participate in the selection of trustees because such persons are "affected" by its activities. Rather, as the court of appeals' decision makes clear, it permits such persons to participate because their activities and interests as members of these groups are reasonably related to some of the major missions and goals of the institution. Petitioners cannot formulate their own rationale for the charter classifications and then proceed to demonstrate how this conjectural rationale requires the inclusion of the petitioners in the trustee selection process.

Even apart from petitioners' contention as to the rationale for the charter classifications, the mere fact that Penn State affects the lives of its students does not create a constitutional right to vote. As Justice Renquist noted in *Salyer Land Co. v. Tular Lake Water Basin Stor. Dist.*, 410 U.S. 719 (1973), at page 732:

> "Even though appellants derive no benefit from the *Reynolds* and *Kramer* lines of cases, they are, of course, entitled to have their equal protection claim assessed to determine whether the State's decision to deny the franchise to residents of the district while granting it to landowners was 'wholly irrelevant to achievement of the regulation's objections," Kotch v. Board of River Port Pilot Commissioners for Port of New Orleans, 330 U.S. 552, 556, 67 S.Ct. 910, 912, 91 L.Ed. 1093 (1947). No doubt residents within the district may be affected by its activities. But this argument proves too much. Since assessments imposed by the district become a cost of doing business for those who farm within it, and that cost must ultimately be passed along to the consumers of the produce, food shoppers in far away metropolitan areas are to some extent likewise 'affected' by the activities

> of the district. Constitutional adjudication cannot rest on any such 'house that Jack built' foundation, however."

Therefore, the exclusion of students, *qua students*, from participation in the selection process cannot make irrational an otherwise rational classification.

In any event, there are rational reasons why a university might choose to exclude students from participation in the selection of its board of trustees. For example, Penn State could rationally conclude that students might vote their own short term economic self interests, rather than the overall needs of the institution, in an inflationary era of rising tuition. Many other rational reasons could be cited.

THE DECISION OF THE THIRD CIRCUIT TURNS ON ITS OWN PARTICULAR FACTS AND IS NOT OF IMPORTANCE BEYOND THE INTERESTS OF THE LITIGANTS.

The relationship between The Pennsylvania State University and the Commonwealth of Pennsylvania is unique in the United States. So far as respondents are aware, no other state chose to designate a private nonprofit corporation as the Land Grant institution and, to protect the public interest, place a minority of public representatives on the board with the consent of the majority. Although this is a unique arrangement, it has proved wise because it has guaranteed the institution autonomy, within a framework of fiscal responsibility, and has insulated the institution from the political affairs of state government.

Consequently, the decision of the Third Circuit is based upon a unique set of facts not applicable to any other institution of higher education in the nation. The decision has

no effect as a direct precedent on any other potential litigants, particularly state universities and their students. It is not sufficiently important for this Court to grant the petition for writ of certiorari.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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